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No. [redacted] 52

In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1958

HARRY A. HAHN,

Petitioner,

v.

ROSS ISLAND SAND & GRAVEL CO.,
a corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

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SUBJECT INDEX

Page

Petition for a Writ of Certiorari to The Supreme Court of the State of Oregon 1

Citations to Opinions Below 1

Jurisdiction 2

Question Presented 3

Constitutional and Statutory Provisions Involved 3

Statement 4

1. Procedural History and Federal Question Presented 4

2. Facts Material to the Question Presented 5

Reasons for Granting the Writ 8

Conclusion 17

Appendix A 19

U. S. Constitution 19

Federal Statutes 19

Oregon Statutes 21

Appendix B 27

Opinion of Oregon Supreme Court 27

Judgment of Oregon Supreme Court 49

CASES

Page

Baskin v. Industrial Accident Commission, 338 US 854, 70 S Ct 99, 94 L ed 523, (89 Cal App 2d 632, 201 P2d 549) (sub nom Kaiser Co. v. Baskin), 340 US 886, 71 S Ct 208, 95 L ed 643 (97 Cal App 2d 257, 217 F 2d 733) 11, 14

Davis v. Department of Labor & Industries, 317 US 249, 63 S Ct 225, 87 L ed 246 11, 12, 13, 14

Hahn v. Ross Island Sand & Gravel Co., 66 Or. Adv. Sh. 117, 320 P2d 668 1

Moores' Case (sub nom Bethlehem Steel Co. v. Moores), 335 US 874, 69 S Ct 233, 93 L ed 417, (323 Mass 462, 80 NE 2d 478) 11, 14

Motor Boat Sales v. Parker (4 CCA), 116 F2d 789, 793; reversed on other grounds, 314 US 244) 12

Parker v. Motor Boat Sales, Inc., 314 US 244, 62 S Ct 221, 86 L ed 184 13

Penn. Railroad Co. v. O'Rourke, 344 US 334, 73 S Ct 302, 97 L ed 367 15, 16

Richard v. Lake Charles Stevedores (La), 95 So 2d 830, 831 13

Southern Pacific Company v. Jensen, 244 US 205, 37 S Ct 524, 61 L ed 1086 12, 14

U. S. Casualty Co. v. Taylor (CCA 4), 64 F2d 521, 524; cert. den. 290 US 639, 78 L ed 555 12

U. S. CONSTITUTION AND STATUTES

Art. I, Sec. 8, Cl 18 (U. S. Constitution) 3, 19

Art. III, Sec. 2, Cl 1 (U. S. Constitution) 3, 19

28 USC, Sec. 1257 (3) 2
33 USC, Title 33 2, 3, 27, 29
33 USC Sec. 903 3, 12, 19
33 USC Sec. 905 3, 13, 15, 20

OREGON STATUTES

	Page
ORS 654.305 - 654.335	4, 8, 23, 24, 25, 26
ORS 656.002 - 656.590	7, 22, 23
ORS 656.006	4, 8, 15
ORS 656.022	4, 7, 29
ORS 656.024	4, 8, 15
ORS 656.082 to 656.086	22
ORS 656.084(2)	4, 7
ORS 656.152	4, 7

TEXTS

Bulletin No. 161 (Revised) State Workmen's Compensation Laws, U. S. Department of Labor, August 1957 — 9, 14, 15

68 Harvard Law Review, 637, 647, 648 — 15

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Oregon, entered in the above-entitled case on January 22, 1958, with a denial of petition for rehearing on February 18, 1958.

CITATIONS TO OPINIONS BELOW

The only written opinion, that of the Supreme Court of the State of Oregon (R 19-40) is printed in Appendix B hereto, infra, p 27, and is reported in 66 Or. Adv. Sh. 117, 320 P2d 668.

JURISDICTION

The judgment of the Supreme Court of the State of Oregon was entered January 22, 1958 (R 41; App B, infra, 49). Rehearing was denied on February 18, 1958 (R 44). The jurisdiction of this Court is invoked under 28 USC, Section 1257(3).

The question for review was first raised in the trial court in paragraph IV of respondent's further and affirmative defense as follows:

> "That the sole and exclusive liability of the defendant for any injuries for which the plaintiff may have incurred as alleged in plaintiff's second amended complaint is that liability provided for under the Longshoremen & Harbor Workers' Compensation Act." (R 8½.)

The opinion of the Oregon Supreme Court states:

> "The action of the trial court was based upon the view that plaintiff's sole remedy is under the Longshoremen's and Harbor Workers' Compensation Act (33 USC, Title 33, §§901 et seq.). This ruling presents the only question on this appeal." (R 20; App. B 27.)

And later in its opinion the court states:

> "We are brought thus to the question of the application to this case of the Longshoremen's and Harbor Workers' Act of 1927. This is a question of federal law and the decisions of the Supreme Court of the United States are, of course, controlling." (R 24; App. B 32.)

QUESTION PRESENTED

1. An employer, *ex parte*, rejects a state workman's compensation act;

2. His "twilight zone" employee is injured through the employer's negligence;

3. The employee would be entitled to state compensation benefits but for the employer's rejection;

4. The compensation act grants such employee another remedy against the employer;

Is the employee prevented by the U. S. Constitution and the Longshoremen's Act from exercising such substitute remedy?

The Oregon Supreme Court says: "Yes, such injured employee has no state remedy whatsoever."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional and statutory provisions involved are:

(a) U. S. Constitution:

Art III, Sec 2, cl 1
Art I, Sec 8, cl 18

(b) Federal Statutes:

Longshoremen's and Harbor Workers' Compensation Act
33 USC 903
33 USC 905

(c) Oregon Statutes:

Workmen's Compensation Act
ORS 656.006
ORS 656.022
ORS 656.024
ORS 656.084(2)
ORS 656.152

Employers' Liability Act
ORS 654.305 to ORS 654.335

They are printed in Appendix A, infra, 19-26.

STATEMENT

1. Procedural History and Federal Question Presented

Petitioner, injured March 23, 1955 while employed by respondent, filed this action pursuant to the Oregon Employer's Liability Act in the Circuit Court of the State of Oregon for the County of Multnomah (App B, 27). Prior to petitioner's employment, respondent had rejected the Oregon Workmen's Compensation Act (App B, 29). Respondent pleaded by answer that the Longshoremen's and Harbor Workers' Compensation Act was petitioner's exclusive remedy (R 8½). Upon trial, a verdict was returned for petitioner on February 10, 1956, in the sum of $38,242, and judgment was entered in that amount, plus costs (R 15). Thereafter, on respondent's motion, the trial court set aside the judgment for petitioner on the sole ground that the Longshoremen's Act was petitioner's exclusive remedy, and entered judgment for respondent (R 17; App B, 27).

Petitioner appealed to the Oregon Supreme Court, which on January 22, 1958, affirmed on the sole ground

that the Longshoremen's Act was petitioner's exclusive remedy (App. B 45-46). Thereafter, on February 18, 1958, the Oregon Supreme Court denied petitioner's petition for rehearing without opinion (R 44). Petitioner has no further remedy for appellate review in the state courts of Oregon.

2. Facts Material to the Question Presented

Respondent has been in the business of commercially dredging sand and gravel for sale for many years. The product comes from the center (lagoon) of Ross Island, which island is located in the navigable Willamette River, State of Oregon (Tr 7). The land portion of Ross Island is shaped like a horseshoe. At the north end there is a single opening allowing the river to come in and form a lagoon (Tr 18; See Ex 4, Tr 16). Respondent owns all of Ross Island (including the east part which is sometimes called Hardtack Island), including all the land under the lagoon. The entire area owned by respondent is enclosed in red pencil on Exhibit 1 (Tr 7).

Respondent dredges sand and gravel from the bottom of the lagoon and digs away at the sides (Tr 7), loading the product on barges, which are towed a short distance to respondent's rock crusher, also in the lagoon (Tr 89; Ex 4, Tr 16 and Ex 10, Tr 33). There a conveyor belt conveys all the sand and gravel to shore for sale (Tr 125, 126).

Respondent operates the lagoon as it pleases, having driven piling and cement piers throughout (Tr 21, 22, 113, 123-125; Ex 1), built and maintains a large tower

in the center of the only entrance to the lagoon (Tr 125, 126; Exs 1 and 10), and rents space therein for parking, breaking up and sorting log rafts and booms, blocking off large portions of the lagoon (Tr 113-120, 130; Ex 4); respondent would eject anyone from the lagoon who desires to stay there without paying respondent's rental rates (Tr 129-132). The U. S. Government has drawn harbor lines around the entire property, excluding the lagoon (Tr 96, Ex C, R 18). A comparison of Exhibit D (map of Ross Island in 1895; Tr 96, 97, R 18) and Exhibit 4 (recent photo) shows how respondent has completely altered the island and lagoon. Respondent dredges without permit from any governmental authority and pays no royalties (Tr 7).

Petitioner's regular employment with respondent was as an oiler on a dredge anchored to the shore (Tr 21). Here sand and gravel was dredged from the bottom of the lagoon. The place he worked is shown with a small inked "x" on Exhibit 4 (Tr 43, 44). All his work was in the lagoon (Tr 18).

March 23, 1955, petitioner did his regular dredge work for several hours (Tr 29); he was then ordered to the rock crusher (see small inked "o" on Ex 4 for location in lagoon) to do cleanup work (Tr 29, 30). Two of respondent's barges were next to the rock crusher in the lagoon. Respondent was transferring a gravel hopper or bin (used to load trucks with gravel on land, Tr 31) owned by respondent (Tr 122, 123), from one barge to the other (Tr 31). (See the "o" on Ex 4 for location of barges, Tr 44). After a land based crane

(Tr 31) had lifted the hopper from one barge and put it on the other, petitioner was ordered to go up a ladder on the hopper to loosen the crane cable (Tr 34, 35). Due to respondent's negligent disregard of established safety rules for ladders (App B, 28), the ladder broke loose as petitioner got to the top (Tr 44), and he was seriously and permanently injured (App B, 28). The hopper was to be barged across the Columbia River a short distance to Cathlamet, Washington, for use by respondent in connection with its sale of sand and gravel, it having been brought into the lagoon by another barge from another nearby road job of respondent in Oregon (Tr 120).

The Oregon Workmen's Compensation Act is contained in ORS 656.002 through 656.590. Pertinent provisions are referred to in the next few paragraphs and are printed in Appendix A, infra, 19-26.

Petitioner and respondent were subject to the Compensation Act at the time of injury. The Act provides such a sand and gravel operation is under the Act (ORS 656.084(2), App A, 22).

Injured workmen covered by the Act may only receive specified sums from the State Industrial Accident Fund, and such payments are in lieu of all other claims against the employer (ORS 656.152, App A, 23).

However, petitioner was not covered by such payments under the Compensation Act because, pursuant to ORS 656.022 (App A, 21) (part of the Act), re-

spondent had, *ex parte*, rejected the Act (Tr 97; App B, 29).

ORS 656.024 (also part of the Compensation Act) provides that a rejecting employer is entitled to none of the benefits of the Act, and is liable in an action by an employee for injuries occasioned by the employer's negligence, default or wrongful act as if the Act had not been passed; and removes certain defenses (App A, 22).

ORS 656.006 (App A, 21) (also part of the Compensation Act) provides that where an employee is authorized under the Compensation Act to bring an action against his employer (see paragraph above), his action may, in applicable situations, be brought pursuant to the Oregon Employer's Liability Act (ORS 654.305 through 654.335; App A, 23-26). It was pursuant to this provision of the Workmen's Compensation Act (ORS 656.006) that petitioner brought this action.

Respondent had private insurance coverage for its liability under the Oregon Workmen's Compensation Act as rejected (ORS 656.024) and under the Oregon Employer's Liability Act (ORS 656.006; 654.305-654.335) (Tr 97).

REASONS FOR GRANTING THE WRIT

The Oregon Supreme Court, while apparently tacitly agreeing (or at least not denying) that this case falls within the "twilight zone," held that petitioner could not recover under Oregon law because the recovery did not consist of workmen's compensation benefits as such

—but rather was under the Employer's Liability Act based on negligence. In other words, the Oregon Supreme Court strictly confined state recovery in the "twilight zone" solely to workmen's compensation payments —even though the Compensation Act itself provided for the remedy sought against a rejecting employer.

Obviously, it is important to petitioner that he be allowed redress under the laws of his own state. But this importance is not confined to petitioner. There are millions of workers in the United States not covered by any workmen's compensation act. Many thousands, perhaps millions, of these people from time to time find themselves on the water or waterfront — on a boat or barge—in a "twilight zone" situation, as did petitioner. This includes persons in all walks of life — carpenters, ship fitters, electricians, delivery men, plumbers, dredge operators, mechanics, helpers, truck drivers, and a host of others. Are all these people to be denied access to the local forum?

The importance of this is pointed up by Bulletin 161 (Revised), State Workmen's Compensation Laws, published by the U. S. Department of Labor, August 1957. At page 2, the following appears:

> "There are great variations in the provisions of the different [compensation] laws. They vary as to type of law, coverage, amounts of benefits paid, insurance requirements, and administrative procedures. Because of coverage limitations, and the fact that about half the laws are elective rather than compulsory, many thousands of workers are still unprotected by these laws. Estimates of the number of workers covered under the State and Federal

programs vary. A recent estimate published in the Social Security Bulletin of the Health, Education, and Welfare Department states that in an average week of 1955, 39-40 million workers had protection under the State and Federal workmen's compensation programs. A few years before, the Chamber of Commerce had placed the number at 45 million, and the President's Commission on the Health Needs of the Nation at 35 million.

"These estimates indicate that at most not more than 75 percent of the workers in this country are covered, and the number may be less than 60 percent. This leaves 25 to 40 percent of the total workers without protection under workmen's compensation for injuries suffered on the job. Many of these unprotected workers are included in the 2 million persons each year who suffer occupational injuries and deaths. The yearly average for such injuries and death for the 7 years 1946 to 1952, inclusive, was 17,529 killed or totally disabled for life, 86,243 partially disabled for life, and 1,911,800 more temporarily disabled — a yearly average total of 2,015,557 injuries and deaths."

At page 3, the following appears:

"An elective act is one in which the employer has the option of of [sic] either accepting or rejecting the act, but in case he rejects it he loses the customary common law defenses—assumed risk of the employment, negligence of fellow servants, and contributory negligence. Although most employers elect to come under the act, some do not. In the latter case the employees may be unable to obtain compensation unless they sue for damages.
* * * *

"Twenty-nine of the workmen's compensation acts are compulsory and 25 are elective for most of the employments covered."

Obviously, through no fault of their own, many thousands, perhaps millions, of uncovered persons from all over the country are apt, at some time, or often, to be in "twilight zone" situations.

These uncovered workers should not be in the position of petitioner who was seriously and permanently injured over three years ago. To date he has not received one cent in redress, damages or compensation. Because he wants to proceed under his own state law, he is being forced to come to this Court merely to establish his right to maintain an action against his negligent employer who voluntarily and *ex parte* prevented petitioner from obtaining payments under the state workmen's compensation act. The question whether these uncovered workers may seek redress pursuant to appropriate state law is of extreme importance and should be settled.

Under the facts as stated supra (5-7), and as stated by the Oregon Supreme Court (App B, 27, 28, 30-32), there can be no question that this is a "twilight zone" situation. Factually, it is as strong, or stronger, for state jurisdiction than the facts in the cases of Davis v. Department of Labor & Industries, 317 US 249, 63 S Ct 225, 87 L ed 246; Moores' Case (sub nom Bethlehem Steel Co. v. Moores), 335 US 874, 69 S Ct 233, 93 L ed 417 (323 Mass 462, 80 NE2d 478); or Baskin v. Industrial Accident Commission, 338 US 854, 70 S Ct 99, 94 L ed 523 (89 Cal App2d 632, 201 P2d 549); (sub nom Kaiser Co. v. Baskin), 340 US 886, 71 S Ct 208, 95 L ed 643 (97 Cal App2d 257, 217 P2d 733).

The Oregon Court stated:

> "In enacting the Longshoremen's and Harbor Workers' Compensation Act 'Congress intended to exercise to the fullest extent all the power and jurisdiction it had over the subject-matter.'" (App B, 43.)

This is most doubtful. The Act was a direct result of the decision in Southern Pacific Company v. Jensen, 244 US 205, 37 S Ct 524, 61 L ed 1086. Twice Congress tried to undo the *Jensen* decision, but this Court struck down the efforts. The very wording of 33 USC § 903(a), (App A, 19-20), shows that Congress wanted to give to the states everything this Court would allow (*Davis* case 317 US at 252, 253). The statute was the reluctant act of Congress attempting merely to fill a void created by the *Jensen* decision, where this Court prevented a state remedy.

Nor does the reference to "workmen's compensation" in 33 USC § 903(a) confine an injured workman to workmen's compensation provisions of state statutes. As pointed out in U. S. Casualty Co. v. Taylor (CCA 4), 64 F2d 521, 524; cert. den. 290 US 639, 78 L ed 555:

> "The phrase 'may not validly be provided by State law' obviously refers to the authority of the state to act and not to the inquiry as to whether a state has exercised its power."
>
> (See also *Motor Boat Sales v. Parker* (4 CCA), 116 F2d 789, 793; reversed on other grounds, 314 US 244.)

In fact, when the Longshoremen's Act was passed, five states (N.C., S.C., Miss., Fla. and Ark.) did not even have a workmen's compensation act.

The remedy petitioner seeks is essentially the same as Congress provided when it enacted 33 USC § 905 of the Longshoremen's Act (App A, 20); i.e., a workman injured by fault of his employer may sue the employer for damages with certain defenses removed, where the employer fails to secure payment of compensation as required under the Longshoremen's Act. In other words, as to non-complying employers, the result is the same whether under state or federal law.

After years of agonizing hairsplitting on what was maritime employment, this Court in the Parker v. Motor Boat Sales, Inc., 314 US 244, 62 S Ct 221, 86 L ed 184, and *Davis* (317 US 249) cases set up a "twilight zone" area where the injured workman could choose his forum as between federal and state law. By means of presumptions, this Court made it clear it would sustain the workman in his choice of remedy (a recent case, Richard v. Lake Charles Stevedores (La) 95 So(2) 830, 831, cert. den. by this Court March 3, 1958, referred to this as "concurrent jurisdiction"). - - - If the workman chose a state remedy, he would be sustained by the presumption of constitutionality of the state law. The presumption of constitutionality applies to any state law under consideration (*Davis* case, 317 US at 257, 258)—thus, it is *presumed* that the application of the Oregon Employer's Liability Act is constitutional. The Oregon Supreme Court failed to consider or discuss the presumption of constitutionality.

The Constitution of the United States permits the application of one of 48 different compensation laws in such situations, and compensation laws do vary greatly

(See Bulletin 161, supra, p 9). The only uniformity in the various Acts is in their consistent non-uniformity. Thus, there can be no sound reason for drawing the line against the same application of closely related state laws. Particularly is this true where the compensation law in question specifically provides for such a remedy by the workman if the employer rejects the compensation act.

The Oregon Supreme Court obviously does not like the *Davis, Baskin* and *Moores* solution:

> "In our view, the 'twilight zone' was a contrivance—a 'quasi-legislative decision', Judge Hutcheson called it in the *De Bardeleben* case — for discouraging jurisdictional disputes as between state and federal compensation laws and not as between the Federal Compensation Law and the right to bring an action for damages under state law." (App. B, 43, 44.)

Be that as it may, this Court recognized the unfortunate results of the *Jensen* decision, the appalling hardship to injured workmen, and rendered a practical solution.

If this Court allows the Oregon Supreme Court's restricted interpretation of the *Davis* case to stand, thousands of uncovered workers will be vitally affected by this decision, which will be cited wherever the question arises—and this court will again find itself faced with the task of splitting hairs.

But perhaps more basic yet is the anomaly of allowing employers in the 25 elective states to, *ex parte*, make a constitutional determination. That is, if the employer alone decides it is best for him to comply with the state act, his workmen may recover under state law. On the

other hand, if the employer decides it is to his advantage to reject the act, his workmen are constitutionally forbidden to recover under state law. There are few employers who merit this power of constitutional decision.

The obvious purpose of ORS 656.024 and 656.006 (App A, 21, 22) is to actively encourage employers to comply with the compensation act. The same provisions generally appear in all elective Acts (See Bulletin 161, supra, 10). That was clearly the purpose of Congress in putting the last portion of 33 USC 905 (App A, 20) into the Longshoremen's Act. - - The restrictive decision of the Oregon Supreme Court will, to the contrary, actively encourage employers all over the United States to reject elective compensation acts, and thus effectively prevent their employees from recovering under state law. Whereas, if the Oregon Supreme Court is reversed, the opposite will result. Employers, knowing that they will be subject to actions pursuant to provisions such as ORS 656.024 and ORS 656.006 will be considerably less willing and eager to peremptorily reject the Act, as did respondent. Employers should not be allowed to use the U. S. Constitution as a device to thwart the humanitarian purposes of the workmen's compensation acts (See 68 Harvard Law Review 637, 647, 648).

The Oregon Supreme Court, in arriving at its decision, places heavy reliance on the case of Penn. Railroad Co. v. O'Rourke, 344 US 334, 73 S Ct 302, 97 L ed 367 (App B, 44, 47, 48). True, there is a superficial similarity between *O'Rourke* and the case at hand in that one involves the Federal Employer's Liability Act and this

case involves the Oregon Employer's Liability Act. But there the similarity ends. This court clearly stated in footnote 8 (334 US at 341) of the *O'Rourke* decision that no constitutional question was involved; only the interpretation of two federal statutes. This Court should clear up this complete misapplication of the *O'Rourke* doctrine by the Oregon Supreme Court.

It appears wholly illogical to say that the states can constitutionally apply compensation laws, but not other closely related, or substitute, laws. Workmen's compensation laws have a humane purpose — liability without fault. But there can be nothing unconstitutional in allowing a further remedy where there is a grave fault as there was in this case—and particularly when the employer is solely responsible for the failure of the compensation provisions of the law to apply — *and the compensation law* itself provides for that further remedy.

The U. S. Constitution is a broad document, susceptible to intelligent and reasonable interpretation. It is nonsensical and unreasonable to leave any injured workman remediless in his own state only because his employer rejected the Act. The only reasonable interpretation that can be given is—in the "twilight zone" the states may constitutionally apply their workmen's compensation acts, *and* other laws which are supplemental thereto in the event the employer has failed or refused to provide workmen's compensation coverage. Such is only consonant with the Acts themselves. Petitioner, as well as the thousands of other uncovered "twilight zone" employees throughout the country, is entitled to such a reasonable interpretation of the U. S. Constitution.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

U. S. CONSTITUTION

ARTICLE III — Section 2, Clause 1:

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made or, which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State; — between Citizens of different States; — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

ARTICLE 1 — Section 8, Clause 18:

"The Congress shall have Power * * *

"To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

FEDERAL STATUTES

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT:

33 USC 903:

"(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and

if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. No compensation shall be payable in respect of the disability or death of—

"(1) A master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

"(2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof.

"(b) No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another."

33 USC 905:

"The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee."

OREGON STATUTES:

WORKMEN'S COMPENSATION ACT (ORS 656.002 to 656.590) PERTINENT SECTIONS:

ORS 656.006 EFFECT ON EMPLOYER'S LIABILITY LAW. ORS 656.002 to 656.590 do not abrogate the rights of the employe under the present employers' liability law, in all cases where the employe, under ORS 656.002 to 656.590 is given the right to bring suit against his employer for an injury.

ORS 656.022 EMPLOYER'S ENGAGED IN HAZARDOUS OCCUPATIONS AS SUBJECT TO WORKMEN'S COMPENSATION LAW. (1) All persons engaged as employers in any of the hazardous occupations specified in ORS 656.082 to 656.086 shall be subject to ORS 656.002 to 656.590; provided, that any such employer may be relieved of certain of the obligations imposed by those statutes and shall lose the benefits conferred by those statutes by filing with the commission written notice of an election not to be subject thereto in any manner specified in those statutes.

(2) Where an employer is engaged in a hazardous occupation, as defined in ORS 656.082 to 656.086, and is also engaged in another separate occupation or other separate occupations not so defined as hazardous, he shall not be subject to ORS 656.002 to 656.590 as to the separate nonhazardous occupations, nor shall his workmen wholly engaged in such separate nonhazardous occupations be subject thereto except by an election as authorized by ORS 656.034.

(3) Employers who are engaged in an occupation partly hazardous and partly nonhazardous come under ORS 656.002 to 656.590 as if the occupation were wholly hazardous.

(4) It is the purpose of this section that an occupation and all work incidental thereto and all workmen engaged therein shall be wholly subject to or wholly outside the provisions of ORS 656.002 to 656.590.

ORS 656.024 ELECTION OF EMPLOYER ENGAGED IN HAZARDOUS OCCUPATION NOT TO CONTRIBUTE; LIABILITY OF EMPLOYER SO ELECTING. Before becoming engaged as an employer in any hazardous occupation defined by ORS 656.082 to 656.086, the employer may file with the commission a statement in writing declaring his election not to contribute to the Industrial Accident Fund, and thereupon shall be relieved from all obligations to contribute thereto. Such employer shall be entitled to none of the benefits of ORS 656.002 to 656.590 and shall be liable for injuries to or death of his workmen, which are occasioned by his negligence, default or wrongful act as if such statutes had not been passed. In any action brought against such an employer on account of an injury sustained by his workman, it shall be no defense for the employer to show that:

(1) The injury was caused in whole or in part by the negligence of a fellow-servant of the injured workman.

(2) The negligence of the injured workman, other than his wilful act committed for the purpose of sustaining the injury, contributed to the accident.

(3) The injured workman had knowledge of the danger or assumed the risk which resulted in his injury.

ORS 656.084 LIST OF HAZARDOUS OCCUPATIONS. The hazardous occupations to which ORS 656.002 to 656.590 are applicable are as follows: * * *

(2) The operation of gravel, sand or coal plants or bunkers; flour, feed or chop mills; creosoting or wood-treating works; garbage works; wood saws, stockyards, tanneries, grain elevators, rock crushers, briquet plants, ice plants, cold storage plants, canneries, milk condenseries, creameries, foundries, blast furnaces, mines, gas works, water works, reduction works, breweries, distilleries, wineries, wharves, docks, smelters, powder works or quarries.

ORS 656.152 WHAT ARE COMPENSABLE INJURIES; RIGHT TO COMPENSATION AS IN LIEU OF CLAIM AGAINST EMPLOYER. (1) Every workman subject to ORS 656.002 to 656.590 while employed by an employer subject to ORS 656.002 to 656.590 who, while so employed, sustains personal injury, or injury to prosthetic appliances by accident arising out of and in the course of his employment and resulting in his disability, or the beneficiaries of such workman, if the injury results in death, are entitled to receive from the Industrial Accident Fund the sums specified in ORS 656.002 to 656.590. The repair or replacement of prosthetic appliances so injured shall be provided subject to the approval of the commission.

(2) The right to receive such sums is in lieu of all claims against his employer on account of such injury or death, except as otherwise specifically provided in ORS 656.002 to 656.590.

EMPLOYERS' LIABILITY ACT:

ORS 654.305 PROTECTION AND SAFETY OF PERSONS IN HAZARDOUS EMPLOYMENT GENERALLY. Generally, all owners, contractors or sub-contractors and other persons having charge of, or responsible for, any work involving a risk or danger to the employes or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices.

ORS 654.310 PROTECTIVE MEASURES TO BE OBSERVED REGARDING CERTAIN MACHINES, EQUIPMENT AND DEVICES WHICH ARE DANGEROUS TO EMPLOYEES. All owners, contractors, sub-contractors or persons whatsoever, engaged in the construction, repairing,

alteration, removal or painting of any building, bridge, viaduct or other structure or in the erection or operation of any machinery, or in the manufacture, transmission and use of electricity, or in the manufacture or use of any dangerous appliance or substance, shall see that:

(1) All metal, wood, rope, glass, rubber, gutta percha or other material whatever, is carefully selected and inspected and tested, so as to detect any defects.

(2) All scaffolding, staging, false work or other temporary structure is constructed to bear four times the maximum weight to be sustained by said structure, and such structure shall not at any time be overloaded or overcrowded.

(3) All scaffolding, staging or other structure more than 20 feet from the ground or floor is secured from swaying and provided with a strong and efficient safety rail or other contrivance, so as to prevent any person from falling therefrom.

(4) All dangerous machinery is securely covered and protected to the fullest extent that the proper operation of the machinery permits.

(5) All shafts, wells, floor openings and similar places of danger are inclosed.

(6) All machinery other than that operated by hand power, whenever necessary for the safety of persons employed in or about the same or for the safety of the general public, is provided with a system of communication by means of signals, so that at all times there may be prompt and efficient communication between the employees or other persons and the operator of the motive power.

(7) In the transmission and use of electricity of a dangerous voltage, full and complete insulation is provided at all points where the public or the em-

ployees of the owner, contractor or sub-contractor transmitting or using the electricity are liable to come in contact with the wire, and dead wires are not mingled with live wires, nor strung upon the same support, and the arms or supports bearing live wires are especially designated by a color or other designation which is instantly apparent.

(8) Live electrical wires carrying a dangerous voltage are strung at such distance from the poles or supports as to permit repairmen to freely engage in their work without danger of shock.

ORS 654.315 PERSONS IN CHARGE OF WORK TO SEE THAT ORS 654.305 TO ORS 654.335 IS COMPLIED WITH. The owners, contractors, sub-contractors, foremen, architects or other persons having charge of the particular work, shall see that the requirements of ORS 654.305 to 654.335 are complied with.

ORS 654.320 WHO CONSIDERED AGENT OF OWNER. The manager, superintendent, foreman or other person in charge or control of all or part of the construction, works or operation shall be held to be the agent of the employer in all suits for damages for death or injury suffered by an employee.

ORS 654.325 WHO MAY PROSECUTE DAMAGE ACTION FOR DEATH; DAMAGES UNLIMITED. If there is any loss of life by reason of violations of ORS 654.305 to 654.335 by any owner, contractor or sub-contractor or any person liable under ORS 654.305 to 654.335, the surviving spouse and children and adopted children of the person so killed and, if none, then his or her lineal heirs and, if none, then the mother or father, as the case may be, shall have a right of action without any limit as to the amount of damages which may be awarded. If none of the persons entitled to maintain such action reside within the state, the executor or administrator of the deceased person may maintain such action for their respective benefits and in the order above named.

ORS 654.330 FELLOW SERVANT'S NEGLIGENCE AS DEFENSE. In all actions brought to recover from an employer for injuries suffered by an employee, the negligence of a fellow servant shall not be a defense where the injury was caused or contributed to by any of the following causes:

(1) Any defect in the structure, materials, works, plant or machinery of which the employer or his agent could have had knowledge by the exercise of ordinary care.

(2) The neglect of any person engaged as superintendent, manager, foreman or other person in charge or control of the works, plant, machinery or appliances.

(3) The incompetence or negligence of any person in charge of, or directing the particular work in which the employee was engaged at the time of the injury or death.

(4) The incompetence or negligence of any person to whose orders the employee was bound to conform and did conform and by reason of his having conformed thereto the injury or death resulted.

(5) The act of any fellow servant done in obedience to the rules, instructions or orders given by the employer or any other person who has authority to direct the doing of said act.

ORS 654.335 CONTRIBUTORY NEGLIGENCE. The contributory negligence of the person injured shall not be a defense, but may be taken into account by the jury in fixing the amount of the damage.

APPENDIX B

OPINION OF OREGON SUPREME COURT

LUSK, J.

This is a personal injury action under the Oregon Employers' Liability Act in which the court set aside a verdict for the plaintiff and entered judgment for the defendant notwithstanding the verdict. The plaintiff has appealed. The action of the trial court was based upon the view that plaintiff's sole remedy is under the Longshoremen's and Harbor Workers' Compensation Act (33 USC, Title 33, §§ 901 et seq.). This ruling presents the only question on this appeal.

The defendant is an Oregon corporation which operates a sand and gravel business on the Willamette River in Portland. It conducts dredging operations with the use of a dredge, barges and power-driven machinery in a portion of the river referred to in the testimony as a lagoon—a small bay or inlet roughly rectangular in shape, the entrance to which from the main body of the river is at the north. Otherwise, it is surrounded by land—Ross Island on the west, Hard Tack Island on the east, and a strip of land on the south connecting the two.

On the day that plaintiff was injured, March 23, 1955, and for some eight days prior thereto, he was employed by the defendant as an "oiler." His general duties were on a dredge anchored to the shore, which was used to scoop out sand and gravel from the bottom of the lagoon and dump it on a barge. He looked after the machinery

of the dredge and operated a winch to move the barge into position. If there was a breakdown in the machinery it was his duty to repair it. The barge, when filled, was moved to the crusher, which was located inside of the lagoon, and, after the gravel was crushed, it was carried by means of a conveyor belt to the defendant's plant on the right bank of the river. He was injured, however, while performing a different type of work. He was ordered to assist in transferring a large gravel bin or hopper, used for loading sand and gravel into trucks, from one barge to another. The hopper was so constructed that trucks could be driven under it to receive their loads. A power-driven crane on shore was employed to pick up the hopper and move it. After the hopper was moved and stowed it became the plaintiff's job to go to the top of the hopper by means of a ladder nailed to the hopper and loosen a cable used in the moving operation. He had climbed high enough to reach the top rung of the ladder with his hand when the ladder gave way, and he fell a distance of about eight or ten feet, landing on his back on hard-packed sand in the barge and receiving serious injuries. The ladder fell upon him. The evidence shows that the ladder, which was constructed of heavy timbers, was fastened to the hopper only by nails which had been driven into wood that was rotten. No bolts or chains were used to make it secure, although it was practicable to use them. There seems to be no question about the negligence of the defendant or its violation of the provisions of the Employers' Liability Act.

In 1927 Congress passed the Longshoremen's and

Harbor Workers' Compensation Act in order to provide compensation irrespective of fault for injury or death in the case of employees of employers "any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock)." USC, Title 33, §902(4). Section 903(a) provides in part:

> "(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law."

Liability of an employer as prescribed by the Act is made exclusive, but, if any employer fails to secure payment of compensation as required by the Act, an injured employee, or his legal representative in case death results from the injury, is given an election to claim compensation or to maintain an action at law or in admiralty for damages, in which case the defenses of negligence of a fellow servant, assumption of risk, and contributory negligence are not available to the employer. § 905.

The defendant had secured payment of compensation as required by the Federal Act, § 932, but had exercised its election not to be subject to the Workman's Compensation Law of this state (ORS 656.022).

It is contended first, on the part of the plaintiff, that the injury did not occur upon "navigable waters of the United States," but as to this we think that there can

be little doubt. The body of water upon which the injury occurred is a portion of the Willamette River which is concededly a navigable stream. Willamette Iron Bridge Co. v. Hatch, 125 US 1, 8 S Ct 811, 31 L ed 629; Port of Portland v. Reeder, 203 Or 369, 280 P2d 324. Tugs, the largest of which has a draft of nine feet, ply in and out of the lagoon. The hopper upon which plaintiff met with his injury was towed in a barge by tug owned and operated by the defendant to the lagoon from Sun Dial Beach on the Sandy River, a tributary of the Columbia River, and afterwards was taken by the same means to Cathlamet on the Columbia River in the state of Washington. The tug referred to was 50 feet long. It was used to tow sand and gravel "from one job to another," going at times to Ilwaco, Washington, about three miles from the mouth of the Columbia River and up the Columbia as far as the Bridge of the Gods.

The test for determining what are navigable waters of the United States was thus stated by Mr. Justice Field in The Daniel Ball, 77 US 557, 563, 19 L ed 999:

> "* * * The doctrine of the common law as to the navigability of waters has no application in this country. Here the ebb and flow of the tide do not constitute the usual test, as in England, or any test at all of the navigability of waters. There no waters are navigable in fact, or at least to any considerable extent, which are not subject to the tide, and from this circumstance tide water and navigable water there signify substantially the same thing. But in this country the case is widely different. Some of our rivers are as navigable for many hundreds of miles above as they are below the limits of tide water, and some of them are navigable for great

distances by large vessels, which are not even affected by the tide at any point during their entire length. A different test must, therefore, be applied to determine the navigability of our rivers, and that is found in their navigable capacity. Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water."

See, also, Crowell v. Benson, 285 US 22, 55, 52 S Ct 285, 76 L ed 598; Daily v. City of New York, 128 Fed 796 (SD NY 1904); 1 Benedict on Admiralty (6th ed) 94-96.

The evidence discloses that the body of water in question fully meets this test. It is navigable in fact and therefore in law, and forms "by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water." The fact that the defendant owns the land partially surrounding the lagoon does not militate against this conclusion. United States v. Chicago, M & St. P. & P. R. Co., 312 US 592, 596-597, 61 S Ct 772, 85 L ed

1064. The government has drawn harbor lines around the land, but whether water is inside or outside harbor lines is not a test of navigability. See Port of Portland v. Reeder, supra. People v. The Commissioners of Land Office, 202 App Div 240, 196 NYS 115, cited by the plaintiff, is not in point. Other facts to which plaintiff calls attention, such as that the defendant has no permit from any governmental authority to dredge sand in the lagoon; that it has enlarged the area of the lagoon and diminished that of the land, that it charges owners of log rafts for the privilege of parking them in the lagoon; and has erected therein piling and structures which may constitute obstructions to navigation, we believe to be irrelevant.

We are brought thus to the question of the application to this case of the Longshoremen's and Harbor Workers' Act of 1927. This is a question of federal law and the decisions of the Supreme Court of the United States are, of course, controlling.

Ten years before the Longshoremen's and Harbor Workers' Act was passed the Supreme Court reversed a judgment of the New York Court of Appeals which sustained an award of compensation under the New York Compensation Law to the widow and children of one Jensen, who was accidentally killed while working as a stevedore unloading cargo from a vessel berthed in the North River, navigable waters of the United States. Southern Pacific Co. v. Jensen, 244 US 205, 37 S Ct 524, 61 L ed 1086, LRS 1918C 451, Ann Cas 1917E 900 (1917). The reasoning of the court was as follows: Article III,

§ 2, of the Constitution, extends the judicial power of the United States "to all cases of admiralty and maritime jurisdiction," and Article I. § 8, confers upon Congress the power "To make all laws which may be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof." Pursuant to this provision Congress enacted the Judiciary Act of 1789, which gives to the district courts "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction; * * * saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." Congress has the power to fix and determine maritime law throughout the country, and, in the absence of a controlling statute, general maritime law, as accepted by the federal courts, is applicable to matters within the maritime and admiralty jurisdiction. The work in which Jensen was engaged, his contract of employment, and his injuries were all maritime, and the rights and remedies of the parties were within the maritime jurisdicton. Further, since the remedy of the Compensation Act was wholly unknown to the common law, it was not saved to suitors from the grant of exclusive jurisdiction in the Judiciary Act. It was therefore concluded that the New York statute, as attempted to be applied, "works material prejudice to the characteristic features of the general maritime law [and] interferes with the proper harmony and uniformity of that law in its international and interstate relations."

This was a five to four decision, Justices Holmes and Pitney wrote dissenting opinions, both of which were concurred in by Justices Brandeis and Clarke. There has been considerable dissatisfaction with it both among commentators and in the Supreme Court itself, but it has never been overruled, and it was cited as recently as 1953 as controlling authority. Pennsylvania Railroad Co. v. O'Rourke, 344 US 334, 73 S Ct 302, 97 L ed 367.

Following the Jensen case Congress twice amended the Judiciary Act in endeavors to secure to maritime workers the benefits of state compensation laws.[1] Both amendments were held unconstitutional on the authority of the Jensen case. Knickerbocker Ice Co. v. Stewart, 253 US 149, 40 S Ct 438, 64 L ed 834, 11 ALR 1145 (1919); Washington v. W. C. Dawson & Co., 264 US 219, 44 S Ct 302, 68 L ed 646 (1924).

Against this background, Congress enacted the Longshoremen's and Harbor Workers' Compensation Act. A great deal of litigation followed in which the question involved was whether, under the circumstances of the particular case, application of a state compensation law interfered "with the proper harmony and uniformity of" maritime law, the test laid down in the Jensen case. This history is reviewed in Davis v. Department of Labor, 317

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[1]The Act of October 6, 1917, added to the savings clause of the Judiciary Act of 1789 the following: "and to claimants the rights and remedies under the workmen's compensation law of any State." The Act of June 10, 1922, amended this new matter so as to read "and to claimants for compensation for injuries to or death of persons *other than the master or members of the crew of a vessel* their rights and remedies under the workmen's compensation law of any State," etc. (Italics added.)

US 249, 63 S Ct 225, 87 L ed 246. See, also, Nogueira v. N.Y., N.H. & H.R. Co., 281 US 128, 50 S Ct 303, 74 L ed 754; 2 Larson, Workmen's Compensation Law, pp 409-413; Gilmore and Black, The Law of Admiralty, pp 344-348. If the workman was injured in an employment considered to be "maritime but local," that is, only indirectly connected with navigation and commerce, recovery under a state compensation law was permissible. The rule was thus summarized in Sultan Railway & Timber Co. v. Department of Labor and Industries, 277 US 135, 137, 48 S Ct 505, 72 L ed 820 (1928):

> "It is settled by our decisions that where the employment, although maritime in character, pertains to local matters, having only an incidental relation to navigation and commerce, the rights, obligations and liabilities of the parties, as between themselves, may be regulated by local rules which do not work material prejudice to the characteristic features of the general maritime law or interfere with its uniformity. Grant Smith-Porter Co. v. Rohde, 257 U.S. 469; Millers' Indemnity Underwriters v. Braud, 270 U.S. 59; Alaska Packers Association v. Industrial Accident Commission, 276 U.S. 467."

Otherwise, the federal Act afforded the exclusive remedy, as provided in USC § 903. In many instances the problem of where to draw the line was extremely difficult, and fine distinctions were indulged so that it became well-nigh impossible in some instances to predict on which side of the line a particular case would fall. Two of the decisions of this court during this period are illustrative. In Mark v. Portland Gravel Co., 130 Or 11, 278 P 986 (1929), the plaintiff was injured while working as

engineer upon a dredge in the Columbia River, scooping up sand from the bed of the river and loading it on barges alongside for purposes of sale. The "local concern" doctrine was applied, and the plaintiff's remedy held to be exclusively under the State Compensation Law. The court relied on Grant Smith-Porter Ship Co. v. Rohde, 257 US 469, 42 S Ct 157, 66 L ed 321, 25 ALR 1008 (1922), in which the Supreme Court of the United States held that an injury sustained by the plaintiff while working as a carpenter on an uncompleted vessel on the Willamette River was compensable under the Oregon Compensation Law. In Martinson v. State Ind. Acc. Com., 154 Or 423, 60 P2d 972 (1936), the workman was, at the time of his injury, assisting in the loading of machinery on a barge moored to a wharf on the Willamette River at Portland. The barge, when loaded, was to be towed to Bonneville Dam on the Columbia River. This court held that the work in which the plaintiff was engaged was maritime in nature, under the rule that loading or unloading a vessel is not a matter of purely local concern (Northern Coal & Dock Co. v. Strand, 278 US 142, 49 S Ct 88, 73 L ed 232; Employers' Liability Assurance Corp. v. Cook, 281 US 233, 50 S Ct 308, 74 L ed 823), and that there could be no recovery under the State Compensation Law.

In 1941 the Supreme Court of the United States decided the case of Parker v. Motor Boat Sales, 314 US 244, 62 S Ct 221, 86 L ed 184. One Armistead was a janitor and handyman for a small store selling boats and maritime equipment. His work was almost entirely on land, but on the occasion in question he went out in a small

motor boat on the James River, the boat capsized, and he was drowned. The boat was being operated by a fellow employee on a test run. Armistead's duty at the time was to keep a lookout for hidden objects in the muddy river. His widow was awarded compensation by the Deputy Commissioner under the authority of the Longshoremen's and Harbor Workers' Act, the District Court affirmed, the Circuit Court of Appeals reversed, and the Supreme Court reversed the Circuit Court of Appeals and restored the original award.

As stated by Professor Larson, op cit 413:

> "This decision by the highest court appeared to scrap the 'local' exception to maritime employment, for the relation to navigation and commerce of a casual and unauthorized ride in a tiny outboard motor boat might seem to approach the vanishing-point."

See, also, Western Boat Bldg. Co. v. O'Leary, 198 F2d 409, 414 (9th Cir 1952).

Davis v. Department of Labor, supra, however, decided in the following year, cast a different light on the matter, at least with respect to the application of state compensation laws to maritime injuries. The question there was upon the application of the compensation law of the state of Washington to the case of an injury resulting in death sustained by Davis, a structural iron worker whose employer was engaged in dismantling an abandoned drawbridge which spanned the Snohomish River, a navigable stream in the state of Washington. Davis was on a barge to which steel from the bridge had been lowered for carriage to a place of storage a short

distance away. He was engaged in cutting pieces of steel into proper lengths for loading, and fell or was knocked into the stream and drowned. The Washington commission denied compensation and its ruling was affirmed by the Supreme Court of the state on the authority of *Jensen* and other United States Supreme Court decisions.

Without overruling the *Jensen* case the Supreme Court, in an opinion by Mr. Justice Black, held that the decedent's widow could validly be compensated under the Washington law. The court, after reviewing the confusion in the decisions following in the wake of *Jensen* and the difficulties encountered by employer and employees upon whom pressed "the horns of the jurisdictional dilemma" said:

> "Harbor workers and longshoremen employed 'in whole or in part upon the navigable waters' are clearly protected by this federal act; but employees such as decedent here, occupy that shadowy area within which, at some undefined and undefinable point, state laws can validly provide compensation." 317 US 253.

The court continued:

> "There is, in the light of the cases referred to, clearly a twilight zone in which the employees must have their rights determined case by case, and in which particular facts and circumstances are vital elements. That zone includes persons such as the decedent who are, as a matter of actual administration, in fact protected under the state compensation act.
>
> "Faced with this factual problem we must give great—indeed, presumptive—weight to the conclusions of the appropriate federal authorities and to

> the state statutes themselves. Where there has been a hearing by the federal administrative agency entrusted with broad powers of investigation, fact finding, determination, and award, our task proves easy. There, we are aided by the provision of the federal act, 33 U.S.C. § 920, which provides that, in proceedings under that act, jurisdiction is to be 'presumed, in the absence of substantial evidence to the contrary.' Fact findings of the agency, where supported by the evidence, are made final. Their conclusion that a case falls within the federal jurisdiction is therefore entitled to great weight and will be rejected only in cases of apparent error. It was under these circumstances that we sustained the Commissioner's findings in Parker v. Motor Boat Sales, supra." 317 US 256-257.

In the *Davis* case the court did not have the benefit of findings of any agency, either federal or state. Indeed, four Washington state tribunals had rejected the claim. Nevertheless, the court, relying on the presumption in favor of constitutionality of the state statute, reversed the judgment of the Washington Supreme Court.

The radical departure from precedent in this decision is indicated when it is borne in mind that, as the Supreme Court of Washington said in its opinion (12 Wash2d 349, 121 P2d 365), Davis was working as a stevedore on a vessel in navigable waters loading cargo, and the Supreme Court of the United States had "uniformly held that the 'loading and stowing the ship's cargo' in navigable waters is a 'maritime service,' and that claims for injury incident thereto are exclusively within admiralty jurisdicton" (citing Atlantic Transport Co. v. Imbrovek, 234 US 52, 34 S Ct 733, 58 L ed 1208, 51 LRA (ns) 1157; Southern

Pacific Co. v. Jensen, supra; Nogueira v. N.Y., N.H. & H.R. Co., supra; Employers' Liability Assurance Corp. v. Cook, supra).

The scope and impact of the *Davis* decision became more apparent in the light of the decisions in two cases following it which originated in state courts. In Moores's Case, 323 Mass 162, 80 NE2d 478 (1948), the question was whether state compensation could validly be awarded to the claimant, who was injured while engaged in repair work on a floating dry dock, though his ordinary work was on land. Previously the Supreme Judicial Court of Massachusetts had held in O'Hara's Case, 248 Mass 31, 142 NE 844, in accordance with firmly established law, that the rights and liabilities of parties with respect to injuries received by workmen engaged in repair of a vessel lying in navigable waters (as distinguished from construction work on an uncompleted vessel) are governed by maritime law (Baizley Iron Works v. Spar, 281 US 222, 50 S Ct 306, 74 L ed 819 (1930); 2 Larson, op cit § 89.25), and that a dry dock, designed to receive vessels floating in navigable waters is itself part of the navigable waters and subject to admiralty jurisdiction. The Steamship Jefferson, 215 US 130, 30 S Ct 54, 54 L ed 125; The Robert W. Parsons, 191 US 17, 24 S Ct 8, 48 L ed 73. But, in view of the *Davis* decision, the Massachusetts court felt bound "to include within the 'twilight zone' the case of a workman engaged in an ordinary land occupation although occasionally going upon a dry dock or vessel to make repairs," and held that the injury was compensable under the State Compensation Law. The

judgment was affirmed by the Supreme Court of the United States without opinion on the authority of the *Davis* case, sub nom. Bethelehem Steel Co. v. Moores, 335 US 874, 69 S Ct 233, 93 L ed 417 (1948).

The other state case referred to was Baskin v. Industrial Accident Commission, 89 Cal App2d 632, 201 P2d 549 (1949). There the claimant's employer was engaged in repairing a vessel tied up at a wharf in San Francisco Bay. Claimant's work was almost entirely on land, but he was sent aboard the ship to perform a service in connection with the repair job and was injured. Compensation under the state law was denied, although the *Davis* case was considered by the court. Certiorari was allowed by the Supreme Court of the United States, which vacated the judgment in a per curiam decision and remanded the cause to the District Court of Appeals for reconsideration in the light of the *Moores* and *Davis* cases. 338 US 854, 70 S Ct 99, 94 L ed 523 (1949). On remand the California court reversed its former ruling (97 Cal App2d 257, 217 P2d 733 (1950)), certiorari was again granted, and the Supreme Court, in a memorandum decision, affirmed the judgment on motion (340 US 886, 71 S Ct 208, 95 L ed 643).

Chief Justice Qua, who wrote the opinion for the court in *Moores's Case*, described the "twilight zone" as "an area of doubt within which the two acts overlap and the injured workman may recover under either of them." He found support for that view in the concurring opinion of Mr. Justice Frankfurter in the *Davis* case, who said "Theoretic illogic is inevitable so long as the employee

in a situation like the present is permitted to recover either under the federal act * * * or under a state statute." 217 US 259. Chief Justice Stone, who dissented in the *Davis* case because he thought that the decision was not "within judicial competence" (317 US 260), said: "Congress by the enactment of the Longshoremen's and Harbor Workers' Act has left no room for an overlapping dual system of the sort which the Court now espouses, placing its decision on a new doctrine that recovery under either the state or the federal act is to be sustained if the case is thought a close one." 317 US 261. Circuit Judge Hutcheson in De Bardeleben Coal Corp. v. Henderson, 142 F2d 481 (5th Cir 1944), referred to "the first come first served" rule of the *Davis* case. Professor Larson says "given a borderline case, and given a presumption of coverage, it follows that all borderline cases are resolved in favor of coverage by the first act under which application is made by the claimant." Larson, op cit 414. This diagnosis, however, seems to be at odds with two United States Court of Appeals decisions which held that, notwithstanding a prior award of compensation by a state tribunal, an award under the federal Act should be sustained, payments theretofore made to the workman pursuant to the state law being credited upon the award made by the Deputy Commissioner. Newport News Shipbuilding & Dry Dock Co. v. O'Hearne, 192 F2d 968 (4th Cir 1951); Western Boat Bldg. Co. v. O'Leary, supra.

We need not pursue this line of inquiry further. It is pertinent only insofar as it may throw light on one of the questions in this case, namely, does the "twilight zone" doctrine apply where the injured workman is not

seeking redress under any compensation statute but through the medium of an action at law? We think that it does not.

In enacting the Longshoremen's and Harbor Workers' Compensation Act "Congress intended to exercise to the fullest extent all the power and jurisdiction it had over the subject-matter." Continental Casualty Co. v. Lawson, 64 F2d 802, 805 (5th Cir 1933), quoted in De Bardeleben Coal Corp. v. Henderson, supra; Travelers Ins. Co. v. McManigal, 139 F2d 949 (4th Cir 1944). The preoccupation of Congress was with the compensation of injured workmen regardless of fault. As Chief Justice Hughes said in the Nogueira case, 281 US 136:

> "When the bill which became the Longshoremen's and Harbor Workers' Compensation Act was pending in Congress, the importance of the policy of compensation acts, and their advantages in providing for appropriate compensation in the case of injury or death of employees without regard to the fault of the employer, were distinctly recognized."

See to the same effect Davis v. Department of Labor, supra, 317 US 254; Norton v. Warner Co., 321 US 565, 570, 64 S Ct 747, 88 L ed 931. Damage actions were not the concern of Congress save in the single instance of the failure of an employer to secure payment of compensation as required by § 905 of the Act, in which case, as previously stated, the injured workman or his legal representative, if death resulted from the injury, may elect to claim compensation or to maintain an action at law or in admiralty for damages.

In our view, the "twilight zone" was a contrivance—

a "quasi-legislative decision," Judge Hutcheson called it in the *De Bardeleben* case—for discouraging jurisdictional disputes as between state and federal compensation laws and not as between the Federal Compensation Law and the right to bring an action for damages under state law. See Gilmore and Black, op cit § 6-52; 2 Larson, Workmen's Compensation Law, § 89.24. It was not recognized in Pennsylvania Railroad Co. v. O'Rourke, supra, which held that a railroad brakeman, injured when unloading box cars from a car float on navigable waters, could not maintain an action under the Federal Employers' Liability Act, but that his sole remedy was under the Longshoremen's and Harbor Workers' Act. See 344 US 341, footnote 8.

Of the numerous reported decisions which have followed the *Davis* case we have been referred to none where the doctrine was invoked to include a choice between an action for damages under state law and federal compensation except Chappel v. C. D. Johnson Lumber Corp., 112 F Supp 625 (D Oregon 1953), where the identical issue was presented, and the court held that, whether the plaintiff was in an exclusive federal area or within the "twilight zone," since he was not covered under the Oregon Compensation Law he could not maintain a common-law action and his sole remedy was under the Longshoremen's and Harbor Workers' Act. "The Act," the court said, "is automatic except in the limited circumstances provided for in the Act. Coverage under a State Workmen's Compensation Law is necessary to avoid automatic coverage under the Act." The judgment in this case was

reversed by the United States Court of Appeals, but on another point. 216 F2d 873 (9th Cir 1954.)

See, also, Scrinko v. Reading Co., 117 F Supp 603, 608 (D NJ 1954).

Based on a suggestion in a scholarly law review article,[2] it is urged by counsel for the plaintiff that, since the Oregon Workmen's Compensation Act provides for an action against an employer who elects not to come under the Act in which the common-law defenses are not available to the defendant, the Act "would apply in toto." That is to say, that in a case such as this where the employer is not under the Act, the provision for an action at law would operate as a substitute for the compensation provision of the Act. We are not persuaded that such a course would accord with the intent of Congress. Nor do we find anything in the *Davis* case which supports it. Rather, we think that we should take for granted that the *Davis* opinion was intended to be limited to the kind of facts it dealt with and to the class of cases out of which emerged the "jurisdictional dilemma," which it was hoped would be dissipated and vanish in the "twilight zone." If, perhaps, a logical argument could be made for the suggestion, nevertheless, like Chief Justice Qua, we "recognize the futility of attempting to reason logically about 'illogic' " (Moores's Case, 323 Mass 167), and will not further attempt to illuminate so dark a subject.

We think this a case to which the Longshoremen's

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[2] "Workmen's Compensation for Maritime Employees: Obscurity in the Twilight Zone" by Robert E. Rodes, Jr., 68 Harv L Rev 637.

and Harbor Workers' Act clearly applies, and that compensation under it is the plaintiff's sole remedy for his injury. He will not have lost this right through delay because, under § 913(a), (d), the one year's time allowed for filing a claim will not begin to run until the termination of this action.

In Newport News Shipbuilding & Dry Dock Co. v. O'Hearne, supra, where the court sustained an award under the federal Act for an injury to a welder engaged in the repair of a graving dry dock, Circuit Judge Soper, writing the opinion for the court, said with reference to the decision of that court in Travelers Ins. Co. v. McManigal, 139 F2d 949 (4th Cir 1944):

> "* * * In that case we reviewed the decisions in border line cases of a maritime nature and endeavored to show the tendency of the courts, acting in the interest of humanity prior to the passage of the Longshoremen's Act, to enlarge the jurisdiction of state compensation commissions by developing the 'local concern' doctrine so as to enable state commissions to make awards to injured men, and the opposite tendency, since the passage of the federal statute, to adhere more strictly to the traditional principle that admiralty jurisdiction depends upon the location of the activities involved upon navigable waters * * *."

Among the cases exemplifying the more recent tendency we call particular attention to Radcliff Gravel Co. v. Henderson, 138 F2d 549 (5th Cir 1943). The employer in that case was engaged in the same business as the defendant here, namely, the dredging of sand and gravel from the bed of a navigable lake. The case involved the death by drowning of two employees. Their job was

trimming the sand and gravel as it was loaded onto barges to keep it from "forming a pyramid or being cone-shaped." The contract of employment provided that the employer was to furnish transportation to and from the shore and dredge boat. Several employees were drowned when a small boat, propelled by an outboard motor, in which they were being transported by their employer, capsized. Awards under the federal Act to the dependents of two of them were sustained, and this without reference to the *Davis* case or the "twilight zone." The case here is even stronger, for, at the time of his injury, the plaintiff was engaged in loading a barge. "A barge is a vessel within the meaning of the Act even when it has no motive power of its own." Norton v. Warner Co., supra, 321 US 571; Martinson v. State Ind. Acc. Com., supra. The loading of a vessel has a direct relation to commerce and navigation and is not a matter of purely local concern. Martinson v. State Ind. Acc. Com., supra; Pennsylvania Railroad Co. v. O'Rourke, supra; Employers' Liability Assurance Corp. v. Cook, supra; Northern Coal & Dock Co. v. Strand, supra. If it should be said that, notwithstanding the survival of *Jensen* (see the *O'Rourke* case, 344 US 337), decisions rendered during the "maritime but local" era are suspect, it nevertheless remains clear that under the *O'Rourke* and *Motor Boat Sales* decisions the present case comes directly under the terms of the federal Act. Section 903 provides for payment of compensation "if the disability or death results from an injury occurring upon the navigable waters of the United States," and § 904 defines the employer, who is made liable for the compensation, as "an employer any of whose employees

are employed in maritime employments, in whole or in part, upon the navigable waters of the United States (including any dry dock)."

The nature of the plaintiff's regular work, the fact, if it were such, that it was not maritime, is not controlling. "The statute applies," said the court in the *O'Rourke* case, "by its own terms, to accidents on navigable waters when the employer has any employees engaged in maritime service." 344 US 339. Again, "Section 902(4) requires the employer to pay compensation if he has 'any' employees so engaged. If, then, the accident occurs on navigable waters, the Act must apply if the injured longshoreman was there in furtherance of his employer's business, irrespective of whether he himself can be labeled 'maritime'." 344 US 341-342. The court said further, "New Jersey could not have enacted statutes granting compensation for respondent's injury on navigable waters." 344 US 337. In short (absent, at least, a choice between the federal and a state compensation law), the federal Act adopts the familiar rule that in tort cases the admiralty jurisdiction depends upon the locality of the injury. The Admiral Peoples, 295 US 649, 55 S Ct 885, 79 L ed 1633 (1935); O'Hara's Case, 248 Mass 31, 142 NE 844 (1924); Ford v. Parker, 52 F Supp 98 (D Md 1943). Cf. State Industrial Commission v. Nordenholt, 259 US 263, 42 S Ct 473, 66 L ed 933, 25 ALR 1013 (1922).

The following cases tend to support the conclusion at which we have arrived: Avondale Marine Ways v. Henderson, 346 US 366, 74 S Ct 100, 98 L ed 77 (1953); Green v. Simpson & Brown Construction Co., 14 NJ 66, 101

A2d 10 (1953); Standard Dredging Corporation v. Henderson, 150 F2d 78 (5th Cir 1945); De Bardeleben Coal Corp. v. Henderson, supra; Ford v. Parker, supra; Travelers Ins. Co. v. McManigal, supra.

We think that the judgment below was right and it is affirmed.

JUDGMENT OF OREGON SUPREME COURT

BE IT REMEMBERED, that at a regular term of the Supreme Court of the State of Oregon, begun and held at the court room in the city of Salem on the first Monday, the 7th day of October, 1957. WHEREUPON on this Wednesday the 22nd day of January, 1958, the same being the 22nd judicial day of said term, there were present:

William C. Perry, Chief Justice,
George Rossman, Associate Justice,
Hall S. Lusk, Associate Justice,
James T. Brand, Associate Justice,
Harold J. Warner, Associate Justice,
Wm. M. McAllister, Associate Justice,
Randall B. Kester, Associate Justice,
F. M. Sercombe, Clerk,

when the following proceedings were had:

HARRY A. HAHN, Appellant,	)	
v.	)	#225-544 Appeal from
ROSS ISLAND SAND & GRAVEL CO., a corporation, Respondent.	)	MULTNOMAH County

This cause on November 20, 1957, having been duly argued and submitted upon and concerning all questions arising upon the transcript and record and then reserved for further consideration; and the court having fully considered all said questions as well as suggestions of counsel in their argument and briefs finds there is not error as alleged.

IT IS THEREFORE CONSIDERED, ORDERED and ADJUDGED that the judgment of the court below in this cause rendered and entered be and the same is in all things affirmed.

The appellant having given an undertaking on appeal with Marie Erkenbeck as his surety conditioned that said appellant will pay all damages, cost and disbursements on appeal that may be taxed against appellant,

IT IS THEREFORE ORDERED that respondent have and recover of and from appellant and his surety its costs and disbursements in this court taxed at $192.00.

IT IS FURTHER ORDERED that this cause be remanded to the court below from which the appeal was taken with directions to enter judgment in accordance herewith.